

# State of South Dakota

EIGHTY-SEVENTH SESSION  
LEGISLATIVE ASSEMBLY, 2012

255T0092

## HOUSE BILL NO. 1217

Introduced by: Representatives Stricherz, Hansen (Jon), and Magstadt and Senator Bradford

1 FOR AN ACT ENTITLED, An Act to enact certain provisions relating to the federal Indian  
2 child Welfare Act and to adopt the South Dakota Indian Family Preservation Act.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. Terms used in this Act mean:

5 (1) "Adoptive placement," the permanent placement of an Indian child for adoption,  
6 including an action resulting in a final decree of adoption;

7 (2) "Child placement proceeding," a judicial proceeding that could result in adoptive  
8 placement, involuntary foster care placement, preadoptive placement, or termination  
9 of parental rights, all as defined in this section. Child placement proceeding includes  
10 a placement based upon a juvenile status offense, but does not include a placement  
11 based upon an act that if committed by an adult would be deemed a crime, or upon  
12 an award of custody in a divorce proceeding to one of the parents;

13 (3) "Demand," a written and notarized statement signed by a parent or Indian custodian  
14 of a child that requests the return of the child who has been voluntarily placed in  
15 foster care;



- 1 (4) "Department," the Department of Social Services;
- 2 (5) "Indian," a person who is a member of an Indian tribe or an Alaskan native and a  
3 member of a regional corporation as defined in section 7 of the Alaska Native Claims  
4 Settlement Act, United States Code, title 43, section 1606, as amended to January 1,  
5 2012;
- 6 (6) "Indian child," an unmarried person who is under age eighteen and is a member of  
7 an Indian tribe or is eligible for membership in an Indian tribe;
- 8 (7) "Indian child's tribe," the Indian tribe in which an Indian child is a member or eligible  
9 for membership. In the case of an Indian child who is a member of or eligible for  
10 membership in more than one tribe, the Indian child's tribe is the tribe with which the  
11 Indian child has the most significant contacts. If that tribe does not express an interest  
12 in the outcome of the actions taken under the provisions of this Act with respect to  
13 the child, any other tribe in which the child is eligible for membership that expresses  
14 an interest in the outcome may act as the Indian child's tribe;
- 15 (8) "Indian Child Welfare Act" or "ICWA," the federal Indian Child Welfare Act, Public  
16 Law No. 95-608, as codified in 25 U.S.C., chapter 21, as amended to January 1,  
17 2012;
- 18 (9) "Indian custodian," an Indian person who has legal custody of an Indian child under  
19 tribal law or custom or under state law, or to whom temporary physical care, custody,  
20 and control has been transferred by the parent of the child;
- 21 (10) "Indian tribe," an Indian tribe, band, nation, or other organized group or community  
22 of Indians recognized as eligible for the services provided to Indians by the secretary  
23 of the interior because of their status as Indians, including any Native group under  
24 the Alaska Native Claims Settlement Act, United States Code, title 43, section 1602,

1 as amended to January 1, 2012;

2 (11) "Involuntary foster care placement," an action removing an Indian child from its  
3 parents or Indian custodian for temporary placement in a foster home, institution, or  
4 the home of a guardian. Under the placement, the parent or Indian custodian may not  
5 have the child returned upon demand, but parental rights have not been terminated;

6 (12) "Parent," the biological parent of an Indian child, or any person who has lawfully  
7 adopted an Indian child, including a person who has adopted a child by tribal law or  
8 custom. Parent does not include an unmarried father whose paternity has not been  
9 acknowledged or established;

10 (13) "Preadoptive placement," the temporary placement of an Indian child in a foster  
11 home or institution after the termination of parental rights, before or instead of  
12 adoptive placement;

13 (14) "Private child-placing agency," a private organization, association, or corporation  
14 providing assistance to children and parents in their own homes and placing children  
15 in foster care or for adoption;

16 (15) "Reservation," Indian country as defined in United States Code, title 18, section  
17 1151, as amended to January 1, 2012, and any lands that are either held by the United  
18 States in trust for the benefit of an Indian tribe or individual, or held by an Indian  
19 tribe or individual subject to a restriction by the United States against alienation;

20 (16) "Tribal court," a court with jurisdiction over child custody proceedings and that is  
21 either a court of Indian offenses, or a court established and operated under the code  
22 or custom of an Indian tribe, or any other administrative body of a tribe that is vested  
23 with authority over child custody proceedings. Except as provided in section 15 of  
24 this Act, nothing in this Act may be construed as conferring jurisdiction on an Indian

1           tribe;

2           (17) "Tribal social services agency," the unit under authority of the governing body of the  
3           Indian tribe that is responsible for human services.

4           Section 2. The department or a private licensed child-placing agency shall determine  
5           whether a child brought to its attention for the purposes described in this Act is an Indian child  
6           and the identity of the Indian child's tribe.

7           Section 3. If the department or a private child-placing agency determines that an Indian child  
8           is in a dependent or other condition that could lead to an out-of-home placement and requires  
9           the continued involvement of the department or the agency with the child for a period in excess  
10          of thirty days, the department or agency shall send notice of the condition and of the initial steps  
11          taken to remedy it to the Indian child's tribal social services agency within seven days of the  
12          determination. At this and any subsequent stage of its involvement with an Indian child, the  
13          department or agency shall give the tribal social services agency full cooperation including  
14          access to all files concerning the child. If the files contain confidential or private data, the  
15          department or agency may require execution of an agreement with the tribal social services  
16          agency that the tribal social services agency shall maintain the data according to statutory  
17          provisions applicable to the data. This section applies if the court transfers legal custody of an  
18          Indian child, following an adjudication for a misdemeanor-level delinquent act.

19          Section 4. In any voluntary adoptive or preadoptive placement proceeding in which the  
20          department, a private child-placing agency, a petitioner in the adoption, or any other party has  
21          reason to believe that a child who is the subject of an adoptive or preadoptive placement  
22          proceeding is or may be an Indian child, as defined in section 1 of this Act and United States  
23          Code, title 25, section 1903(4), as amended to January 1, 2012, the department, agency, or  
24          person shall notify the Indian child's tribal social services agency by registered mail with return

1 receipt requested of the pending proceeding and of the right of intervention under section 7 of  
2 this Act. If the identity or location of the child's tribe cannot be determined, the notice shall be  
3 given to the United States secretary of interior in like manner, who has fifteen days after receipt  
4 of the notice to provide the requisite notice to the tribe. No preadoptive or adoptive placement  
5 proceeding may be held until at least ten days after receipt of the notice by the tribe or secretary.  
6 Upon request, the tribe shall be granted up to twenty additional days to prepare for the  
7 proceeding. The agency or notifying party shall include in the notice the identity of the birth  
8 parents and child absent written objection by the birth parents. The private child-placing agency  
9 shall inform the birth parents of the Indian child of any services available to the Indian child  
10 through the child's tribal social services agency, including child placement services, and shall  
11 additionally provide the birth parents of the Indian child with all information sent from the tribal  
12 social services agency in response to the notice.

13 Section 5. If the department, private child-placing agency, the court, petitioner, or any other  
14 party has reason to believe that a child who is the subject of an adoptive placement proceeding  
15 is or may be an Indian child but the father of the child is unknown, the agency or person shall  
16 provide to the tribe believed to be the Indian child's tribe information sufficient to enable the  
17 tribe to determine the child's eligibility for membership in the tribe, including, the legal and  
18 maiden name of the birth mother, her date of birth, the names and dates of birth of her parents  
19 and grandparents, and, if available, information pertaining to the possible identity, tribal  
20 affiliation, or location of the birth father.

21 Section 6. In cases where an agency or party to a placement knows or has reason to believe  
22 that a child is or may be an Indian child, proof of service upon the child's tribe or the secretary  
23 of interior shall be filed with the adoption petition.

24 Section 7. In any state court proceeding for the foster or adoptive placement of an Indian

1 child, tribes may intervene at any point in the proceeding.

2 Section 8. The Department of Social Services or any agency considering placement of an  
3 Indian child shall make all efforts to identify and locate extended family members and shall be  
4 able to show evidence of these efforts to the court and tribal court, as well as the child's parent's  
5 upon request.

6 Section 9. In considering whether to involuntarily place an Indian child in foster care or to  
7 terminate the parental rights of the parent of an Indian child, the court shall require that qualified  
8 expert witnesses with specific knowledge of the child's Indian tribe testify regarding that tribe's  
9 family organization and child-rearing practices, and regarding whether the tribe's culture,  
10 customs, and laws would support the placement of the child in foster care or the termination of  
11 parental rights on the grounds that continued custody of the child by the parent or Indian  
12 custodian is likely to result in serious emotional or physical damage to the child.

13 Section 10. For the purposes of this Act, the term, qualified expert witness, includes a social  
14 worker, sociologist, physician, psychologist, traditional tribal therapist and healer, spiritual  
15 leader, historian, or elder. In the following descending order of preference, a qualified expert  
16 witness is a person who is one of the following:

- 17 (1) A member of the Indian child's tribe who is recognized by the child's tribal  
18 community as knowledgeable regarding tribal customs as the customs pertain to  
19 family organization or child-rearing practices;
- 20 (2) A member of another tribe who is formally recognized by the Indian child's tribe as  
21 having the knowledge to be a qualified expert witness;
- 22 (3) A layperson having substantial experience in the delivery of child and family services  
23 to Native Americans, and substantial knowledge of the prevailing social and cultural  
24 standards and child-rearing practices within the Indian child's tribe;

1 (4) A professional person having substantial education and experience in the person's  
2 professional specialty and having substantial knowledge of the prevailing social and  
3 cultural standards and child-rearing practices within the Indian child's tribe;

4 (5) A professional person having substantial education and experience in the person's  
5 professional specialty and having extensive knowledge of the customs, traditions, and  
6 values of the Indian child's tribe as the customs, traditions, and values pertain to  
7 family organization and child-rearing practices.

8 Before accepting the testimony of a qualified expert witness described in subdivision (5) of  
9 this section, the court shall document the efforts made to secure a qualified expert witness  
10 described in subdivisions (1) to (4), inclusive. The efforts shall include contacting the Indian  
11 child's tribe's governing body, that tribe's Indian Child Welfare Act office, and the tribe's social  
12 service office.

13 Section 11. An Indian tribe with a tribal court has exclusive jurisdiction over a child  
14 placement proceeding involving an Indian child who resides within the reservation of the tribe  
15 at the commencement of the proceedings. If an Indian child is in the legal custody of a person  
16 or agency pursuant to an order of a tribal court, the Indian tribe retains exclusive jurisdiction,  
17 notwithstanding the residence or domicile of the child.

18 Section 12. In any child placement proceeding, the court shall establish whether an Indian  
19 child is involved and the identity of the Indian child's tribe. This Act and the federal Indian  
20 Child Welfare Act are applicable without exception in any child custody proceeding, as defined  
21 in the federal act, involving an Indian child. This Act applies to child custody proceedings  
22 involving an Indian child whether the child is in the physical or legal custody of an Indian  
23 parent, Indian custodian, Indian extended family member, or other person at the commencement  
24 of the proceedings. A court shall determine the applicability of this Act or the federal Indian

1 Child Welfare Act to a child custody proceeding based upon whether an Indian child is part of  
2 an existing Indian family or based upon the level of contact a child has with the child's Indian  
3 tribe, reservation, society, or off-reservation community.

4 Section 13. In a proceeding for the termination of parental rights or involuntary foster care  
5 placement, involuntary adoption placement of an Indian child not within the jurisdiction of  
6 section 11 of this Act, the court, in the absence of good cause to the contrary, shall transfer the  
7 proceeding to the jurisdiction of the tribe absent objection by either parent, upon the petition of  
8 either parent or the Indian custodian or the Indian child's tribe. The transfer is subject to  
9 acceptance by the tribal court of the tribe.

10 Section 14. To the extent that any child subject to the provisions of this Act is otherwise  
11 eligible for social services, orders of a tribal court concerning placement of the child have the  
12 same force and effect as orders of a court of this state. In any case in which the tribal court  
13 orders placement through the Department of Social Services, the court shall provide to the  
14 child's parents, family members, or guardians notice and an opportunity to be heard regarding  
15 the placement.

16 Section 15. The Department of Social Services and the Department of Tribal Relations may  
17 enter into agreements with Indian tribes pursuant to United States Code, title 25, section 1919,  
18 as amended to January 1, 2012, respecting care and custody of Indian children and jurisdiction  
19 over child custody proceedings, including agreements that provide for orderly transfer of  
20 jurisdiction on a case-by-case basis and agreements that provide for concurrent jurisdiction  
21 between the state and an Indian tribe.

22 Section 16. The Secretary of the Department of Social Services shall publish annually an  
23 inventory of all Indian children in residential facilities. The inventory shall include, by county  
24 and statewide, information on legal status, living arrangement, age, sex, tribe in which the child

1 is a member or eligible for membership, accumulated length of time in foster care, and other  
2 demographic information deemed appropriate concerning all Indian children in residential  
3 facilities. The report shall also state the extent to which authorized child-placing agencies  
4 comply with the order of preference described in United States Code, title 25, section 1901, et  
5 seq, as amended to January 1, 2012.

6 Section 17. A state court entering a final decree or order in an Indian child foster or adoptive  
7 placement shall provide the Department of Social Services, the Department of Human Services,  
8 the Department of Tribal Relations, and the child's tribal social services agency, along with the  
9 Department of Tribal Relations, a copy of the decree or order together with such other  
10 information to show:

- 11 (1) The name and tribal affiliation of the child;
- 12 (2) The names and addresses of the biological parents;
- 13 (3) The names and addresses of the foster or adoptive parents; and
- 14 (4) The identity of any agency having files or information relating to the foster or  
15 adoptive placement.

16 If the court records contain an affidavit of the biological, foster, or adoptive parent  
17 requesting anonymity, the court shall delete the name and address of the biological, foster, or  
18 adoptive parent from the information sent to the child's tribal social services agency.

19 Section 18. Upon the request of an adopted Indian person over the age of eighteen, the  
20 adoptive or foster parents of an Indian person, or an Indian tribal social services agency, the  
21 Department of Social Services shall disclose to the Indian person's tribe information necessary  
22 for membership of an Indian person in the tribe in which the person may be eligible for  
23 membership or for determining any rights or benefits associated with that membership. If the  
24 documents relating to the person contain an affidavit from the biological or adoptive parent

1 requesting anonymity, the department shall use the procedures described in United States Code,  
2 title 25, section 1951, paragraph (b), as amended to January 1, 2012.

3 Section 19. The Department of Social Services and the Department of Tribal Relations, in  
4 consultation with Indian tribes, shall promulgate rules pursuant to chapter 1-26 to establish  
5 standards and procedures for the department's review of cases subject to this Act and methods  
6 for monitoring the department's compliance with provisions of the federal Indian Child Welfare  
7 Act and this Act. The standards and procedures and the monitoring methods shall be integrated  
8 into the department's structure and plan for the federal government's child and family service  
9 review process and any program improvement plan resulting from that process.

10 Section 20. A court of competent jurisdiction shall vacate a court order and remand the case  
11 for appropriate disposition for any of the following violations of this Act:

- 12 (1) Failure to notify an Indian parent, Indian custodian, or tribe;
- 13 (2) Failure to recognize the jurisdiction of an Indian tribe;
- 14 (3) Failure, without cause as specified under this Act, to transfer jurisdiction to an Indian  
15 tribe appropriately seeking transfer;
- 16 (4) Failure to give full faith and credit to the public acts, records, or judicial proceedings  
17 of an Indian tribe;
- 18 (5) Failure to allow intervention by an Indian custodian or Indian tribe, or if applicable,  
19 an extended family member;
- 20 (6) Failure to return the child to the child's parent or Indian custodian when removal or  
21 placement is no longer necessary to prevent imminent physical damage or harm;
- 22 (7) Failure to provide the testimony of qualified expert witnesses as required by this Act;
- 23 (8) Any other violation that is not harmless error, including a failure to comply with 25  
24 U.S.C. § 1911, 1912, 1913, 1915, 1916, or 1917, as amended to January 1, 2012.

1 Section 21. If a petitioner in an Indian child custody proceeding before a state court has  
2 improperly removed the child from the custody of the child's parent or Indian custodian or has  
3 improperly retained custody after a visit or other temporary relinquishment of custody, the court  
4 shall decline jurisdiction over the petition and shall immediately return the child to the child's  
5 parent or Indian custodian unless returning the child to the parent or Indian custodian would  
6 subject the child to a substantial and immediate danger or threat of such danger.

7 Section 22. The Department of Tribal Relations shall appoint a Native American Child  
8 Welfare Advisory Council to help formulate policies and procedures relating to Indian child  
9 welfare services. The council shall consist of thirteen members appointed by the department and  
10 shall include representatives of each of the nine South Dakota tribes who are authorized by tribal  
11 resolution, one representative from the Rapid City urban Native American community, one  
12 representative from the Sioux Falls urban Native American community, one representative from  
13 the Department of Tribal Relations, and one representative from the Department of Social  
14 Services. The terms of the members of the board are for three years. Any member appointed to  
15 fill a vacancy arising from other than the natural expiration of a term may serve for only the  
16 unexpired portion of the term. The council shall annually elect from its members a chair and  
17 such other officers as it deems advisable. A majority of the council members constitutes a  
18 quorum. The council shall hold meetings at the call of the chair or a majority of the members,  
19 but at least one meeting shall be held every four months. The members of the council shall be  
20 paid mileage at the same rate as allowed for state employees. The council shall receive per diem  
21 compensation and allowable expense reimbursement in an amount set pursuant to § 4-7-10.4  
22 for all time actually spent while attending council meetings. However, no per diem may be paid  
23 to council members who are state employees. The per diem shall be paid by vouchers duly  
24 verified and approved by the secretary of the Department of Social Services.

1 Section 23. Section 22 of this Act is repealed on June 30, 2015.

2 Section 24. The annual state goal for children placed in foster care that is funded under the  
3 federal Social Security Act, Title IV-E, as amended to January 1, 2012, is that not more than  
4 fifteen percent of the children will be in a foster care placement for a period of more than  
5 twenty-four months.